BRIEF IN SUPPORT OF PETITION.

A.

Opinions of Courts Below.

The opinion of the Circuit Court of Appeals for the Fifth Circuit is reported in 111 F. (2d) 637 and is appended hereto (Appendix 3). The District Court rendered no written opinion but its findings of fact and conclusions of law appear in the record at pages 146 to 178.

B.

Statement of Case.

A sufficient statement of the case has been made in the petition and in the interests of brevity will not be repeated at this point.

C.

Assignment of Errors.

Petitioners assign as errors the rulings of the Circuit Court of Appeals for the Fifth Circuit upon the questions set forth in the petition.

D.

ARGUMENT.

Point I.

THE JUDGMENT RENDERED BY THE COURTS OF TEXAS IN THE CASE OF CITY OF CORPUS CHRISTI V. FLATO, IS RES JUDICATA OF THE ISSUES INVOLVED IN THIS CASE.

Point II.

THE DECISION IN CORPUS CHRISTI V. FLATO WAS NOT OVERRULED BY THE DECISION IN RADFORD ET AL. V. CITY OF CROSS PLAINS.

Point III.

THE CITY OF CORPUS CHRISTI IS ESTOPPED TO DENY THE VALIDITY OF THE BONDS BY VIRTUE OF ACCEPTING AND RETAINING THE BENEFITS DERIVED BY IT FROM THE ISSUANCE OF THE BONDS.

Point IV.

THE BONDS WERE LEGALLY ISSUED AND THE CITY MAY NOT DISPUTE THEIR VALIDITY.

Point I.

The judgment rendered by the courts of Texas in the case of City of Corpus Christi v. Flato, is res judicata of the issues involved in this case.

The case of *City of Corpus Christi* v. *Flato*, hereafter called the "*Flato* Case," was a suit in equity which involved the validity of the very bonds which are the subject-matter of the case at bar. The City of Corpus Christi was made a party in that suit (R. 93-94). It appeared in the case, filed an answer and joined in the appeal to the Texas Court of Civil Appeals, seeking to reverse the judgment rendered by the trial court (R. 117-119, 474-475, 120-124). The bondholders were represented in the case by the trustees named in the indentures executed by the city to secure the payment of the bonds. The issues presented to the court in that case were identical with the issues in the case at bar. That suit, therefore, involved the same issues which are involved in the case at bar, between the same parties or their privies, and a final judgment was rendered therein by a court of competent jurisdiction. Under the circumstances, that judgment is *res judicata* of the issues involved in the case at bar if it was a decision upon the merits. The Circuit Court of Appeals held that that part of the judgment which went to the merits in the *Flato* case was a mere

dictum, and, therefore, the judgment was not *res judicata*. We submit that such ruling of the Circuit Court of Appeals was erroneous on the ground that there is no such thing as *obiter dictum* in a judgment.

To determine whether a judgment has been rendered upon the merits, it is necessary to examine the judgment itself. In the *Flato* case the trial court, after many amendments to the petition had been allowed, finally disposed of the case upon the fourth amended petition and the trustees' general demurrer and special exceptions. It rendered its judgment sustaining separately the general demurrer and the special exceptions, many of which went to the merits, and dismissed the petition, denying leave to further amend (R. 472-474). An examination of the judgment discloses beyond question that the trial court intended to render a decision upon the merits. It was not a mere judgment dismissing the complaint, but ruled upon the special exceptions and expressly declared that the general demurrer should be sustained. In short, the court rendered its judgment upon two grounds.

When a court renders a judgment upon two grounds, neither ruling of the court is *obiter dictum*. This Court said in *Union Pacific Company* v. *Mason City and Fort Dodge Railroad Co.*, 199 U. S. 160:

> "A distinct ruling on any question fairly arising in a trial is not *obiter dictum*, and where the judgment rests upon two grounds, either being sufficient to sustain it, and the appellate court sustains it on both grounds, the ruling on neither is *obiter* but each is the ruling of the court and of equal validity with the other."

The reason for this principle of law is well stated by the Court of Appeals of the State of New York, in *Sheldon* v. *Edwards*, 35 N. Y. 279. The judgment pleaded as a bar in that case was very similar to the judgment in *City of Corpus Christi* v. *Flato*. Separate rulings had been rendered upon

the merits and upon a plea of abatement. In holding the judgment *res judicata*, the Court said:

> "The court found each issue for the defendant and directed judgment accordingly which was entered. Can any court assume to say that judgment was given upon one issue more than upon another when the record shows it was given alike upon all? Can it be denied that each of these issues was tried and adjudged? What court then can detract from the power or force of the consequences flowing from such judgment upon these issues?"

No decision to the contrary has been found in any jurisdiction in this country, although the question has many times been presented to the courts for determination. See

United States v. *Chamberlin*, 219 U. S. 250, at page 262;
Ex parte Young, 209 U. S. 123, at p. 153;
Kenneth S. MacAffer v. *Boston and Maine Railroad*, 268 N. Y. 400;
Thompkins v. *Missouri, K. & T. Ry. Co. et al.*, 211 Fed. 391, at p. 399;
Bates v. *Taylor*, 87 Tenn. 319, 11 S. W. 266;
Kiernan v. *City of Portland et al.*, 57 Oregon 454; 112 Pac. 402;
State ex rel. Bailey v. *Brookhart*, 113 Iowa 250; 84 N. W. 1064;
King v. *Pauly et al.*, 159 Calif. 549; 115 Pac. 210;
Watson v. *St. Louis, I. M. & S. Ry. Co.*, 169 Fed. 942;
New York Cent. & H. R. R. Co. v. *Price*, 159 Fed. 330;
Chicago, B. & Q. R. Co. v. *Board of Sup'rs of Appanoose County*, 182 Fed. 291;
Kessler et al. v. *Armstrong Cork Co.*, 158 Fed. 744;
Williams v. *Arlington Hotel Co.*, 15 F. (2d) 412;
Van Dyke v. *Parker*, 83 F. (2d) 35;
State ex rel. Weast v. *Moore*, 164 Mo. App. 649; 147 S. W. 551;

Spratt v. *Helena Power Transmission Co.*, 37 Mont. 60; 94 Pac. 631, at p. 634;
Duncan v. *Brown*, 18 New Mexico 579; 139 Pac. 140;
Mayor etc. of City of Paterson v. *East Jersey Water Co.*, 74 N. J. E. 49; 70 Atl. 472, at p. 488;
East Bay Municipal Utility Dist. v. *Kieffer et al.*, 99 Cal. A. 240; 279 Pac. 178;
United States v. *Title Insurance & Trust Co., et al.*, 265 U. S. 472.

We respectfully submit, therefore, that the trial court, in the *Flato* case, rendered a decision upon the merits.

It is the judgment in the case which is *res judicata*, not the opinion of the court which rendered it, or even the opinion of an appellate tribunal which affirms the judgment.

Mayfield Co. v. *Rushing, et al.*, 127 S. W. (2d) 185;
Sheldon v. *Edwards, supra;*
Freeman on Judgments, Fifth Edition, Sec. 772.

A question expressly determined by a court, whose decree is affirmed on appeal is *res judicata* between the parties, although the question was not considered by the appellate court whose affirmance was placed upon other grounds.

Russell v. *Russell*, 134 Fed. 840;
People v. *Skidmore*, 27 Calif. 287;
Simonds v. *Norwich Union Idemnity Co.*, 73 F. (2d) 412;
People v. *Waite*, 243 Ill. 156; 90 N. E. 183;
24 *Am. & Eng. Ency. of Law* (2nd Ed.) 795.

The Circuit Court of Appeals seems to have given little consideration to the judgment rendered in the *Flato* case. It does not mention the judgment in its opinion, but confines itself to a discussion of the opinion which was ren-

dered by the Texas Court of Civil Appeals, affirming the judgment.

But the opinion of the Texas Court of Civil Appeals (Appendix 2) affirmatively shows that that court intended to affirm the judgment upon the merits. It stated in its opinion that the appeal presented for review the trial court's action in sustaining the *general* demurrer. The appellate court first discussed that part of the taxpayer's petition which prayed for a judgment for money damages arising out of an alleged breach of contract and upon this point held that such an action for damages could not be prosecuted by a taxpayer in the absence of a prior demand upon the city to institute such a suit. The court held that the same rule applied to that part of the petition in so far as it prayed for a judgment against the members of the governing body of the city and other city officials for having previously paid out money on account of outstanding bonds. Upon this question the court analyzed the provisions of the charter of the city and held that they did not give a taxpayer the right to institute an action for money damages to which the city might be entitled in the absence of an allegation that prior demand was made upon the city to institute the suit. The court then directed its attention to that part of the taxpayer's petition praying for an injunction restraining the making of any further payments on the bonds and seeking a declaratory judgment establishing their invalidity. With respect to this relief the court first discussed the matter of laches in seeking it and pointed out that the taxpayer was guilty of laches. The court then discussed the merits of the case and, against the very objections now raised in the case at bar, it held the bonds to be valid obligations of the city. That the judgment and decision of the Texas Court of Civil Appeals was intended to be on the merits is further demonstrated by the fact

that the motion for rehearing, filed in the Court of Civil Appeals, specifically objected because the judgment was rendered on the merits, instead of being rendered without prejudice, so that it could not be pleaded as *res judicata* in any subsequent suit (R. 977). This Court has held that that was a proper ground for appeal.

House v. *Mullen,* 22 Wall. 42;
Goodman v. *Niblack,* 102 U. S. 556, 563;
Kendig v. *Dean,* 97 U. S. 423.

The very fact that the Court of Civil Appeals refused to reform the judgment, in the face of express objection that the judgment had been rendered upon the merits, instead of having been rendered without prejudice, conclusively demonstrates that that court intended to affirm the judgment upon the merits.

The petitioner in the Flato Case, after the decision of the Court of Civil Appeals had been rendered, applied to the Supreme Court of Texas for a writ of error. As the appeal involved the interpretation of a Texas statute the Supreme Court had the right to issue a writ of error, had it believed the judgment rendered by the courts below to be erroneous, but under the statutes of Texas when the Supreme Court is satisfied that the *judgment* of the Court of Civil Appeals is correct, but it is not satisfied that the *opinion* of the Court of Civil Appeals correctly declares the law *in all respects,* the Supreme Court is required to dismiss the application for a writ of error for want of jurisdiction.

Texas Rev. Civ. Stat. 1925, Art. 1728, as amended by Ch. 144, Laws 1927; Vernon's Texas Stat. 1936, Art. 1728.

The Supreme Court of Texas dismissed the application for a writ of error for want of jurisdiction (R. 476), thereby

making the judgment of the District Court, as affirmed by the Court of Civil Appeals, a final judgment in the case; *Snelson* v. *Drane,* 134 S. W. (2d) 445; and the correctness of that judgment can no longer be inquired into. *Hetkes* v. *Gehret, et al.,* 16 S. W. (2d) 395; 36 S. W. (2d) 700.

The appellant in the Flato Case thereupon made a motion for a rehearing in the Supreme Court of Texas, assigning a number of errors going to the merits of the cause, among which was the contention that the Court of Civil Appeals had committed an error of substantive law in affirming the judgment of the trial court sustaining the general demurrer, instead of reforming the judgment so as to show that the suit was dismissed upon grounds which would not go to the merits (R. 1033-1035). The Supreme Court of Texas denied a rehearing, and it would therefore seem beyond question that that court likewise intended to affirm the judgment of the trial court upon the merits.

There can be no question that the trial court in the Flato Case, rendered a judgment sustaining the general demurrer, and that judgment was affirmed by the Court of Civil Appeals and by the Supreme Court of Texas. The effect of that judgment as *res judicata* is no doubt a question of State law. *Oklahoma Packing Co. et al.* v. *Oklahoma Gas & Electric Co. et al.,* 309 U. S. 4. But the law of Texas in this respect is no different from that prevailing, generally, throughout the country. The Texas courts have held that a judgment of dismissal, after sustaining a general demurrer to the petition, is *res judicata* of the merits.

Dixon v. *Zadek,* 59 Texas 529;

Kempner v. *First Nat'l Bank of Crockett,* 44 Tex. Civ. App. 500, 99 S. W. 112;

McKinney et al. v. *Stoneham et al.,* 35 S. W. (2d) 450;

Texas Nat'l Bank v. *Zellers, et al.,* 75 S. W. (2d) 890.

This is also true of a judgment which sustains both special exceptions and a general demurrer.

Bomar v. *Parker,* 68 Tex. 435, 4 S. W. 599;
Carpenter v. *Landry et al.,* 45 Tex. Civ. App. 506, 101 S. W. 277;
Jefferson v. *Scott,* 135 S. W. 705;
Galbreath v. *Farrell,* 275 S. W. 238;
Snelson v. *Drane,* 134 S. W. (2d) 445.

In *Bomar* v. *Parker, supra,* in an opinion of the Commission of Appeals, which was adopted by the Supreme Court of Texas, it was said that:

> "A judgment on demurrer may be as conclusive as a former adjudication as would a judgment on the facts; but, to have that effect, it must clearly appear that the demurrer went to the merits of the action or defense; otherwise it would be presumed that the objection was to the form, and not to the merits. Wells, Res. Adj., Sec. 446. Here there were general and special exceptions taken, and all sustained, to Bomar's petition and amendments; and, upon further amendment, curing in part the objection pointed out by the special exceptions, the general and special exceptions were again renewed, and were all sustained. An examination of the pleadings in that case very clearly and distinctly shows that the court, in passing upon the demurrers, considered them as going to the merits of the case, and by the ruling held that there was no cause of action stated in the petition and amendments. Now, as to the correctness of that ruling, we have nothing to say; for that judgment is final and conclusive, as between the parties thereto, until it is reversed, vacated, or set aside."

Such a judgment is *res judicata* even though leave to amend the petition be not granted by the court. *Carpenter* v. *Landry et al., supra.*

Snelson v. *Drane, supra,* presented facts almost identical with those involved in the case at bar. The judgment of

dismissal, which was there held to be *res judicata,* was rendered by the court upon sustaining a plea of abatement, a general demurrer and special exceptions. That judgment was affirmed by the Court of Civil Appeals, and a writ of error was dismissed for want of jurisdiction by the Supreme Court. The court held the judgment to be final and conclusive on the merits.

It should, moreover, be noted that the *Flato* case was a suit in equity. The judgment rendered in that cause was not a dismissal "without prejudice", or words to that effect, but by reason of the court's refusal to permit plaintiff to further amend his petition, was a judgment rendered deliberately with prejudice. It has many times been held that the dismissal of an equity suit, without stating that it is dismissed "without prejudice", or words to that effect, is a dismissal on the merits.

Baker v. *Cummings,* 181 U. S. 117, 124;
Swan Land and Cattle Co. v. *Frank,* 148 U. S. 603;
Durant v. *Essex Company,* 7 Wall. 107;
Wilson v. *Smith,* 126 Fed. 916, 919;
Worrell v. *Whitney et al.,* 185 Fed. 1002.

It is the policy of law of the State of Texas to dispose of all issues that can arise in any case in one proceeding. In *Nueces County et al.* v. *Gussett et al.,* 213 S. W. 725, it was said:

> "Under the Texas system of prosecuting and defending suits, which is largely based on common sense and reason, one great desire is to avoid a multiplicity of suits, and to dispose, at one stroke, of every issue that can arise out of the subject."

See also,

Skipworth v. *Hurt,* 94 Tex. 322, 60 S. W. 423;
Hume v. *Perry,* 136 S. W. 594;

Shell Petroleum Corporation et al. v. *Railroad Commission of Texas et al.*, 86 S. W. (2d) 57;
Warren v. *Houston Oil Co. of Texas et al.*, 6 S. W. (2d) 341.

We respectfully submit, therefore, that the judgment, rendered in the *Flato* case, was a final decision on the merits, because (a) it was a judgment of dismissal rendered in a suit in equity, which was not qualified by stating that the suit was dismissed "without prejudice" or words to that effect; (b) because under the decisions of the courts of the State of Texas a judgment rendered upon general demurrer is a judgment upon the merits, notwithstanding the fact that the court may have also sustained special exceptions to the complaint; and (c) because the judgment shows on its face that the court rendered a decision upon the general demurrer, separately from its decision sustaining the special exceptions, and under such circumstances each ruling is of equal validity and neither is *obiter*.

We also call the court's attention to the fact that among the special exceptions sustained by the judgment in the *Flato* case were a number which went to the merits. Nos. XXI to XXIV, inclusive (R. 908-911), were to the effect that the general laws of the State were applicable to the City of Corpus Christi; Nos. XL to XLII, inclusive (R. 924, 925), were to the effect that the law did not require the issuance of the bonds to be submitted to a vote of the taxpayers; Nos. 4a (R. 929) and 10a (R. 932) were to the effect that the bonds were valid, and Nos. XIV (R. 905) and 5a (R. 930) were to the effect that the city was estopped by virtue of ratification and the receipt of benefits. These special exceptions were in the nature of special demurrers going to the merits of the plaintiff's case. Each of these special exceptions was sustained by the trial court, and the decision of that court upon these special issues is likewise

res judicata as to those issues. *Jackson* v. *Finlay,* 40 S. W. 427. These issues may not be re-litigated by the City of Corpus Christi in the case at bar. The ruling of the court in the *Flato* case, upon the special exceptions, bars the respondent in this case from asserting as a defense (a) that the laws of Texas required the bonds to be submitted to a vote of the taxpayers; (b) that the bonds are invalid; and (c) that the city is not estopped from contesting the validity of the bonds by virtue of the ratification thereof and the receipt of the benefits obtained through the issuance thereof.

The Circuit Court of Appeals in its opinion infers that there may be some doubt whether the city was a party to the *Flato* case. We have above pointed out that the city was made a formal party to that case, filed an answer in the cause, and joined in the appeal to the Court of Civil Appeals. It was, unquestionably, therefore, a party to the action, but had it not been made a formal party, its interest in the subject matter and the position taken by it, would have bound it by the judgment.

Hauke v. *Cooper,* 108 Fed. 922;

Cavers et al. v. *Sioux Oil & Refining Co., et al.,* 39 S. W. (2d) 862; rehearing denied 43 S. W. (2d) 578;

Texas & N. O. R. Co. v. *Tilley,* 297 S. W. 1063, 6 S. W. (2d) 86;

Souffront v. *La Compagnie des Sucreries de Porto Rico,* 217 U. S. 475;

Hanrick et al. v. *Gurley et al.,* 93 Tex. 458, 56 S. W. 330;

In re Cherokee Public Service Co., 94 F. (2d) 536;

Ohio Fuel Gas Co. v. *City of Mt. Vernon,* 37 O. A. 159; 174 N. E. 260.

The decision in *City of Palestine* v. *City of Houston,* 262 S. W. 215, is most instructive upon this point. It appears from the opinion in that case that in a suit brought by the City of Palestine, Texas, against the International and

Great Northern Railway Co., the general offices, machine shops and round house of that company were permanently established and located at Palestine, and the Railroad Company was perpetually enjoined from changing or maintaining them at any place other than the City of Palestine. That judgment was pleaded as *res judicata* in a suit brought, on the relation of the City of Palestine, for the issuance of a writ of prohibition to restrain a proceeding in the District Court of Harris County, in a suit filed in that court by the City of Houston and certain citizens of Harris County, as plaintiffs, against the International and Great Northern Railroad Company, as defendants, seeking a judgment to establish the general offices of the Railroad Company at Houston. The City of Houston had not been made a formal party to the prior suit, but the court said:

> "The city of Houston, having knowledge of the former suit, employed and paid special attorneys of its own choosing to appear therein and assist in the defense and to co-operate with the special attorneys of the railway company in carrying on the litigation in the trial and on appeal, having claim and interest in the subject-matter, in mutual relationship to and identified with the claim and interest of the railway company to the same right. The city of Houston, though not a formal party to the record, through its special counsel in fact appeared therein in actual representation in the name of the railway company, actively participating in the defense of the suit, wherein the rights of the city of Houston were directly put in issue and were as directly determined. * * * The city of Houston and the attorneys representing it were interested beyond merely voluntarily assisting the railway company in the defense. The city was directly, and not merely indirectly, interested in the subject-matter involved, as claimed by the railway company. She was identified in interest with the railway company, which was a party, in having the general offices maintained in Houston and at no

other place. Interest, or the claim of interest, is the test, almost without exception, as to the right to be a party to a legal proceeding. In the circumstances, the city of Houston, and the public that it would legaliy represent, became bound by that judgment by so directly identifying itself through its attorneys, with the proceedings as to be a virtual party thereto. McMillan *v.* Barber Asphalt Paving Co., 151 Wis. 48, 138 N. W. 94, Ann. Cas. 1914B, 53; Cleveland *v.* Heidenheimer (Tex. Civ. App.) 44 S. W. 551; Lake *v.* Weaver, 80 N. J. Eq. 395, 86 Atl. 817."

In the *Flato* case, the City of Corpus Christi was identified in interest with the taxpayer who brought the suit. The City Attorney appeared in the case and endeavored to assist the taxpayer in securing a reversal of the judgment rendered by the trial court. Its interest in the subject matter of the suit was much more direct than was the interest of the City of Houston in the subject matter of the case above referred to. It was the obligor upon the very bonds, the cancellation of which the taxpayer sought in that suit, and the judgment which would be rendered in the action would most directly and vitally affect its interests. Under the decision of *Palestine* v. *Houston, supra,* the City of Corpus Christi, therefore, by its action in supporting the position of the taxpayer in the suit through its City Attorney, would have been bound by the judgment rendered by the court, even if it had not been made a party, and had not filed an answer in the cause.

The petitioners in the case at bar are in privity with the trustees under the indentures who were named parties defendant in the *Flato* case. Each of the indentures under which the trustees in that case were acting, and which had been given as security for the bonds, expressly provided that in all suits in any way affecting the indenture, the trustee should be deemed the representative of the bond-

holders and it should not be necessary to make any bondholder a party to such suit in order to bind him (R. 618, 661, 795). A judgment in the *Flato* case in favor of the taxpayer would have been binding upon the bondholders.

Elwell v. *Fosdick*, 134 U. S. 500, 512, 513;
Richter v. *Jerome*, 123 U. S. 233;
Louis v. *Brown Township*, 109 U. S. 162;
Laing v. *Queen City Ry. Co.*, 49 S. W. 136;
Cavers et al. v. *Sioux Oil & Refining Co., et al.*, 39 S. W. (2d) 862;
Houston Oil Co. v. *Village Mills Co.*, 241 S. W. 122;
Corcoran v. *Chesapeake and Ohio Canal Co.*, 94 U. S. 741;
Beals v. *Illinois, Missouri & Texas R. R. Co.*, 133 U. S. 290;
Kersh Lake Drainage Dist. v. *Johnson, United States Supreme Court*—decided March 25, 1940.

A decision in favor of the validity of the bonds, was, therefore binding upon all other parties to the action, and is *res judicata* in a suit between one of such parties and the bondholders involving the same issues.

It is quite immaterial that in the *Flato* case the court entered an order quashing citation by publication against unknown bondholders. The effect of that order was simply to declare that the unknown bondholders were not formal parties to the cause before the court, but it had no bearing upon the effect of the judgment upon them by reason of their being in privity with the trustees who remained parties to the cause. This precise point was decided by the Supreme Court of California in *Painter* v. *Painter*, 138 Cal. 231, 71 Pac. 90.

The fact that the City of Corpus Christi was a party defendant in the *Flato* case is immaterial. A judgment may be *res judicata* as between two or more co-defendants. The

facts involved in *Louis* v. *Brown Township, supra,* were almost identical with those involved in the case at bar. The township and a privy of the plaintiff in that case had been defendants in a prior suit, instituted by a taxpayer, in which a judgment was rendered holding bonds of the township to be invalid. That judgment was held *res judicata* in a later suit brought by the bondholders against the township. See also:

Chicago, Rock Island & Pacific Railway Co. v. *Schendel,* 270 U. S. 611;

Corcoran v. *Chesapeake and Ohio Canal Co.,* 94 U. S. 741;

Orcutt v. *McGinley et al.,* 96 Neb. 619; 148 N. W. 586;

City of El Reno, et al. v. *Cleveland-Trinidad Paving Co.,* 25 Okla. 648; 107 Pac. 163;

Harmon v. *Auditor of Public Accounts,* 123 Ill. 122; 13 N. E. 161;

Georgia Railroad & Banking Co. v. *Wright,* 124 Ga. 596; 53 S. E. 251;

Waldo v. *Waldo,* 52 Mich. 91; 17 N. W. 709;

Millikan v. *City of Lafayette,* 118 Ind. 323; 20 N. E. 847;

Giblin v. *North Wisconsin Lumber Co.,* 131 Wis. 261; 111 N. W. 499;

Morgan v. *Hart,* 84 Wash. 496; 147 Pac. 26;

Secor v. *Singleton,* 41 Fed. 725;

Cook, et al. v. *City of Des Moines,* 125 Iowa 611; 101 N. W. 434.

This is also the law of Texas.

Gordon v. *Thorp,* 53 S. W. 357;

Carnes v. *Carnes,* 26 Civ. App. Tex., 610; 64 S. W. 877.

Under the Texas practice, the court could have rendered a judgment for or against any of the defendants or any

of the plaintiffs. (Texas Rev. Statutes 1925, Art. 2211; Vernon's Texas Statutes, 1936, Art. 2211).

POINT II.

The decision in Corpus Christi v. Flato was not overruled by the decision in Radford et al. v. City of Cross Plains.

The Circuit Court of Appeals states in its opinion that the decision, rendered in the *Flato* case by the Texas Court of Civil Appeals, and which became the final judgment of that court by reason of the dismissal of the motion for a writ of error by the Supreme Court of Texas, was overruled by the later decision of the Supreme Court of Texas, in *Radford et al.* v. *City of Cross Plains,* 86 S. W. (2d) 204. We respectfully submit that the *Cross Plains* case did not overrule the decision in the *Flato* case because the facts in these cases differ, and for that reason a principle of the law of Texas, as announced by decisions of the Supreme Court of Texas, which was applicable to the *Flato* case was not, on the facts, applicable to the *Cross Plains* case.

Moreover, it is apparent from the Record in the case at bar that the Supreme Court of Texas felt that the two cases were distinguishable. When the Supreme Court dismissed the application for a writ of error in the *Flato* case, it was familiar with the *Cross Plains* case. One of the grounds assigned for the application to the Supreme Court of Texas for a writ of error in the *Flato* case was that the Court of Civil Appeals had rendered a decision, which conflicted with the decision in the *Cross Plains* case, rendered by another Court of Civil Appeals (R. 1001, 1003, 1019). When the application for a writ of error was made to the Supreme Court of Texas the *Cross Plains* case was pending in that court (R. 1001). It is apparent, therefore, that the Supreme Court of Texas had these two cases under consideration at the same time. It dismissed the application for a writ

of error in the *Flato* case, October 2, 1935 (R. 476). The report of the *Cross Plains* case, 86 S. W. (2d) 204, shows that it filed its opinion in that case, October 9, 1935. Thereafter, a motion for a rehearing in the *Flato* case was filed in the Supreme Court of Texas admitting that the Court of Civil Appeals had held the bonds valid obligations, but contending this was error in substantive law (R. 1033-1035). Rehearing was denied by the court. It is apparent, therefore, that the Supreme Court of Texas must have felt that the decision in the *Cross Plains* case was distinguishable from its decision in the *Flato* case. Any other interpretation would mean that the Supreme Court of Texas had deliberately rendered two conflicting decisions and had refused to correct its error after it had been brought to its attention. We respectfully submit that no court is justified in indulging in such a presumption. On the contrary it must be assumed that the Supreme Court of Texas regarded the two cases as distinguishable.

There are at least two grounds upon which the two cases can be distinguished. The Circuit Court of Appeals states in its opinion that the bonds involved in the *Cross Plains* case were issued for the same purposes as were the bonds involved in the case at bar. That, however, is not so. In the *Cross Plains* case a water system was incumbered for the purposes of that system ***and to build a sewer system.*** The Supreme Court of Texas had previously held in *City of Dayton* v. *Allred*, 123 Texas, 60, 68 S. W. (2d) 172, that the statutes of Texas did not permit the incumbering of one public utility for the purpose of constructing a different utility, without a vote of the qualified voters of the city. The bonds involved in the *Flato* case were issued for the purpose of acquiring additional water powers for the water system which was encumbered. No attempt was made to encumber the water system to construct a different public utility, as was attempted in the *Cross Plains* and *Dayton*

cases. There is no decision of the Supreme Court of Texas holding that bonds, solely for the purpose of acquiring additional water powers, payable out of the revenues of the municipal water system, must be voted by the qualified voters of the city.

Another ground of distinction is, the City of Cross Plains offered restitution to the bondholders, as appears from the opinion of the Supreme Court of Texas in the *Cross Plains* case. No offer of restitution had been made, or has yet been made by the City of Corpus Christi, and one of the very points decided by the trial court in the *Flato* case was that the City of Corpus Christi was estopped to contest the validity of the bonds because it had received and was retaining the benefits derived from their issuance. We will proceed to point out that under the decisions of the Supreme Court of Texas, which we respectfully submit are binding upon the Federal courts, an estoppel does arise under such circumstances, and the Circuit Court of Appeals erred in ignoring these rulings.

Point III.

The City of Corpus Christi is estopped to deny the validity of the bonds by virtue of accepting and retaining the benefits derived by it from the issuance of the bonds.

Under the decisions of this Court, the Federal courts are obliged to follow and apply the law of the State as construed by the State courts. We respectfully submit that the Circuit Court of Appeals has completely ignored the decisions of the courts of Texas in reversing the decision of the United States District Court. The United States District Court held that the City was estopped to contest the validity of the bonds, because it had received and was retaining the benefits derived from their issuance. As heretofore pointed out, the trial court in the *Flato* case

sustained a special exception to the same effect. These rulings conform to the decisions of the Supreme Court of Texas.

In *Hill County* v. *Bryant & Huffman, et al.*, 118 Tex. 359; 16 S. W. (2d) 513, the Supreme Court of Texas held that a corporation, whether public or private, could not avoid liability under void but executed contracts, where such contracts are not *malum in se,* or *malum prohibitum,* or against public policy, where the benefits under them had been received. In that case the court said:

> "In cases where corporations, municipal or otherwise, partnerships or persons, attempt to avoid their liabilities under void but executed contracts, where such contracts are not *malum in se* or *malum prohibitum,* or against public policy, and where the benefits under them have been received, the law interposes an estoppel, and declines to permit the validity of such contracts to be called in question."

Likewise, in the case of *Payne* v. *First Nat. Bank of Columbus, Ohio,* 291 S. W. 209, the Supreme Court of Texas held that a city was estopped upon non-negotiable warrants issued in violation of the Constitution of the State, because of receipt and retention of benefits. In the opinion of the Commission of Appeals which was adopted by the Supreme Court of Texas, it was said:

> "we are thoroughly convinced that a municipal corporation, under the facts of this case, should be held to rules of estoppel, the same as the individual citizen would be under the same circumstances."

See also, *City of Corpus Christi* v. *Central Wharf and Warehouse Co.,* 8 Tex. Civ. App. 97; 27 S. W. 803, which was cited by the Supreme Court of Texas, in the Hill County case, as an authority to the same effect.

In *Sluder* v. *City of San Antonio,* 2 S. W. (2d) 841, the Commission of Appeals, after holding that a contract for services was invalid, nevertheless held the city liable. In its opinion the court said:

> "The latest expression of our Supreme Court on this question is its approval of the judgment of the Commission of Appeals in the case of Payne et al. *v* Bank, 291 S. W. 210. In that case it was decided that the action of the city of North Pleasanton in attempting to create a debt and pledge the credit of the city as payment *was void under the Constitution and statute,* yet the city was liable to pay its warrants; it appearing that the city had received the benefit of the money that had been acquired and spent for said improvements. The decision is predicated upon the proposition that, while the contract was absolutely void, upon the doctrine of acquiesence, ratification, and estoppel the city could not resist the right of the holders of the warrants to recover thereon when it appeared the city had received the benefit of the proceeds thereof." (Italics ours.)

It will be noted, moreover, that in *Hill County* v. *Bryant & Huffman, supra,* and in *Payne* v. *First Nat. Bank of Columbus, Ohio, supra,* the suit was brought upon the contract and not upon *quantum meruit.* These decisions, therefore, are decisions of the Supreme Court of Texas, to the effect that the law of Texas does not permit a municipal corporation to contest the validity of an executed contract, which is not *malum in se, malum prohibitum,* or contrary to the public policy, when it has received and retains the benefits under the contract. We submit they were binding upon the Circuit Court of Appeals. It made no effort to distinguish them in its opinion, but merely ignored them.

In passing, it might be pointed out that the decision in *City of Hamlin, Tex., et al.* v. *Brown-Crummer Inv. Co.,* 93 F. (2d) 680, which is cited by the Circuit Court of

Appeals in its opinion, is not inconsistent with the views herein expressed. It appears from the opinion in that case that the city of Hamlin tendered restitution to the bondholders. No question of estoppel arising out of receipt and retention of benefits was involved in the Hamlin case.

Point IV.

The bonds were legally issued and the city may not dispute their validity.

The Circuit Court of Appeals decided the bonds were void in the hands of petitioners because their issuance had not been approved by a vote of the qualified electors of the city. Petitioners admit no vote of the qualified electors was had upon the issuance of the bonds, but contend that the statute authorizing their issuance did not require such a vote. The Circuit Court of Appeals has interpreted the decision in *City of Cross Plains* v. *Radford, supra,* as requiring it to hold the bonds void for lack of a vote, notwithstanding the decision in *City of Corpus Christi* v. *Flato, supra,* to the contrary. Petitioners contend the State courts of Texas have never held that bonds, such as those involved in the case at bar, must be voted by the qualified electors. It should be noted that in the *Cross Plains* case it appeared a water system had been encumbered for improvements to an existing sewer system as well as the water system. In keeping with its earlier decision in *Dayton* v. *Allred, supra,* the Texas court held that such bonds could not be issued without an approving vote of the qualified electors because they did not constitute purchase money bonds for additional water powers within the meaning of Article 1112, Revised Civil Statutes, Texas, 1925, exempting such bonds from the requirement of a vote. It was not even contended in the *Cross Plains* case that the bonds were issued for purchase money for additional water powers. The bonds in the case

at bar were issued solely for the purpose of acquiring additional water powers for the benefit of the water system alone and, therefore, it cannot be said they are similar to the bonds before the court in the *Cross Plains* case.

Article 1111, Revised Civil Statutes, Texas 1925, authorized the city to encumber its water system "acquired or to be acquired" and the franchise and income thereof and everything pertaining thereto "to purchase same, or to purchase additional water powers, riparian rights", etc. It cannot be questioned that the city was expressly authorized by this statute to encumber its existing water system for the purpose of purchasing additional water powers and riparian rights. The reference to a system "acquired" as distinguished from one "to be acquired" and the reference to the purchase of "additional" water powers and riparian rights seems to make this clear. Article 1112 prohibited the encumbering of such a system without a vote of the qualified electors "except for purchase money". Obviously when Article 1112 speaks of "purchase money" it means money for the purchases authorized by the same statute and referred to in Article 1111, which with respect to water systems includes the purchase of additional water powers. This was the purpose for which the bonds in the case at bar were issued and they so recite.

It should also be noted that in addition to reciting the purpose of issue, the bonds further recite the performance of all conditions precedent to their issuance. It has been repeatedly held by this Court that such a recital will estop a municipality from asserting the bonds are invalid because no election was held upon their issuance, or because an election was not properly conducted (*Town of Venice* v. *Murdock*, 92 U. S. 494; *Board of Commissioners of the County of Knox* v. *Aspinwall*, 21 How. 539; *Town of Coloma* v. *Eaves*, 92 U. S. 484; *Commissioners of Douglas County* v. *Bowles*, 94 U. S. 104; *Oregon* v. *Jennings*, 119 U. S. 74;

Johnson County v. *January*, 94 U. S. 202; *Bissell* v. *City of Jeffersonville*, 24 How. 287; *Evansville* v. *Dennett*, 161 U. S. 434).

Not only did the city receive the benefits of the bond issue which it now enjoys, but it has by its continued action recognized the bonds as being its valid obligations. Most of the bonds have been outstanding since 1927, and from that time through the year 1932 the city recognized its obligation on the bonds by paying interest thereon. It recognized the bonds as its obligation throughout the negotiations with the bondholders leading up to the making of the Reconstruction Finance Corporation loan, and encouraged the holders of the bonds to forego valuable rights by agreeing to modifications in the terms of the bonds. Having obtained all these benefits the city now repudiates the very instruments through which it received such benefits. Such conduct creates an estoppel against the city. (*Supervisors* v. *Shenck*, 5 Wall. 772; *County of Clay* v. *Society for Savings*, 104 U. S. 579; *Anderson County Commissioners* v. *Beal*, 113 U. S. 227; *Sluder* v. *City of San Antonio*, 2 S. W. (2d) 841; *Hill County* v. *Bryant & Huffman*, 16 S. W. (2d) 513; *Grimes County* v. *W. L. Slayton & Co.*, 262 S. W. 209.)

E.

Conclusion.

Petitioners submit there has been such a miscarriage of justice that the decision of the Circuit Court of Appeals for the Fifth Circuit should be reversed, and that for the reasons set forth in the petition this is a case that calls for the exercise of this Court's power of review.